No. 87-470

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FORT WAYNE BOOKS, INC.,

Petitioner,

—v.—

STATE OF INDIANA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND INDIANA CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND INDIANA CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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The American Civil Liberties Union (ACLU) and the Indiana Civil Liberties Union hereby move for leave to file the attached brief amicus curiae, pursuant to Rule 36.3 of

the Rules of this Court. The reason for the motion is that counsel for respondents has refused to consent to the filing of an amicus brief by the ACLU.

The ACLU is a nationwide, nonpartisan organization with over 250,000 members dedicated to the principles of individual liberty embodied in the Constitution. The Indiana Civil Liberties Union is one of its statewide affiliates. Since its founding nearly 70 years ago, the ACLU has been especially active in free speech cases. Indeed, the ACLU has participated in literally dozens of free speech cases before this Court, either as counsel for one of the litigants or as amicus curiae.

This case raises free speech concerns of vital importance to the ACLU. In recent years, law enforcement officials

around the nation have increasingly relied on RICO-type statutes to seize and suppress expressive material that is presumptively entitled to constitutional protection. They have done so, moreover, without the procedural safeguards that would normally apply in a First Amendment context. By endorsing these initiatives, the decision below seriously jeopardizes core First Amendment principles.

Because the ACLU believes that decision is erroneous, we respectfully move for leave to file the attached brief amicus

curiae in order to present the Court with our views in this important First Amendment case.

Respectfully submitted,

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INTERESTS OF AMICI

The interests of amici are set forth in the motion attached to this brief.

SUMMARY OF ARGUMENT

The decision of the Indiana Supreme Court ignores fifty years of precedent in refusing to apply First Amendment scrutiny to the State's attempt to control obscenity through its RICO law. The State may not forestall such scrutiny by characterizing the statute as a speech-neutral anti-racketeering weapon, since it is the nature of the right threatened -- rather than the State's choice of labels -- that determines the character of constitutional protection.

Measured against First Amendment standards, the Indiana law is constitutionally deficient, both procedurally and substantively. The law allows mass seizures of presumptively protected material based upon a mere ex parte showing of probable cause to believe that two obscenity offenses have been

committed -- violating a rule of thirty years' standing requiring an adversarial adjudication of obscenity prior to such seizures. In addition, the statute fails to place the proper burden upon state officials to institute prompt post-seizure proceedings, fails to guarantee a speedy and final adjudication on the merits, and fails to guarantee that any prior restraint pending final adjudication and appeal will be fixed and strictly limited.

The ultimate remedies of the Indiana RICO law also operate as prior restraints on protected speech. Upon proving that a bookstore has sold two obscene books, the State may padlock it, permanently seize its inventory, revoke its license, and obtain an order restricting its owner from conducting a similar enterprise in the future. Like the injunction barring future publication in Near v. Minnesota, 283 U.S. 697 (1931), these

"punishments" have the direct, immediate, and unavoidable effect of stifling future protected speech. For all these reasons, the Indiana statute must be declared unconstitutional.

ARGUMENT

I.

THE PROTECTIONS OF THE FIRST AMENDMENT MAY NOT BE CIRCUMVENTED BY RE-LABELING OBSCENITY REGULATION AS AN ATTACK ON "RACKETEERING"

Under the Indiana RICO law, a bookstore may be padlocked, and its entire inventory seized, if a judge accepts the ex parte allegation of a police officer that the establishment has sold or exhibited two or more obscene items within five years. If this "pattern of racketeering activity" is proven at trial, the full array of RICO remedies -- including forfeiture, license

revocation, and restrictions upon future activities -- may be imposed upon the bookstore and any related entities constituting an "enterprise," putting them completely out of business.

Despite the obvious and severe impact of these draconian measures upon speech-related activity, the Indiana Supreme Court upheld the statute as a speech-neutral regulation of "racketeering." Through this use of the "racketeering" rubric, the Indiana Supreme Court would permit what this Court has prohibited for more than half a century: the circumvention of basic First Amendment doctrine through semantic devices that attempt to bring laws restricting free speech under the mantle of neutral governmental regulation. This Court and other courts, for example, have refused to allow state officials to suppress speech merely by

dubbing it a "public nuisance." The Court should similarly reject the notion that labeling allegedly obscene speech as "racketeering activity" renders First Amendment standards inapplicable.

In failing to scrutinize the RICO law under these standards, the Indiana Supreme Court ignored this Court's admonition that "in passing upon constitutional questions, the court has regard to substance and not to mere matters of form, and . . . the statute must be tested by its operation and effect." Near v. Minnesota, 283 U.S. 697, 708 (1931). In Near, the Court struck down a statute declaring the publication of a "malicious, scandalous, and defamatory" publication to be a nuisance, and providing for the permanent injunction of "such nuisance." Id. at 702-03. Despite Minnesota's argument that the injunction

entered under the statute was a content-neutral measure in the nature of a business regulation, this Court held that the law must be scrutinized for its impact on future protected speech. "Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint." Id. at 720.

The Court has never departed from this holding of Near; fifty years later it declared that "the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed." Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981). In Schad, the Court reviewed under the First Amendment a governmental ban on nude dancing despite the assertion that the regulation was

merely an exercise of state zoning power. Id. It is the effect of state regulation on speech activity -- and not simply its form or stated purpose -- that determines the degree of scrutiny to be applied.

State anti-racketeering laws, modeled on the federal RICO statute, are but the most recent method adopted by local officials seeking more effective civil weapons against alleged obscenity. State and local governments have used zoning provisions, building code enforcement, licensing laws, and, most prominently, nuisance abatement laws, to augment criminal obscenity prosecutions. See Note, Pornography, Padlocks, and Prior Restraints: The Constitutional Limits of the Nuisance Power, 58 N.Y.U. L. Rev. 1478, 1478 (1983). Because such varied means of barring or restricting expression borrow from doctrines embodying

minimal procedural safeguards, courts have been careful to scrutinize these laws under traditional First Amendment standards.

For example, most courts have rejected attempts to apply so-called "red light" laws or general public nuisance abatement statutes to enjoin the distribution of obscene materials, noting that these statutes do not reflect modern First Amendment standards both of substance and procedure. See cases collected in Note, supra, at 1486 & nn. 61-63. Even when states have amended or enacted statutes expressly to address obscenity as a "public nuisance," courts have not hesitated to demand compliance with First Amendment requirements. See, e.g., Vance v. Universal Amusement Co., 445 U.S. 308, 317 (1980) (per curiam) (striking down obscenity injunction for failure to provide constitutionally adequate proce-

dures); Spokane Arcades, Inc. v. Brockett, 631 F.2d 135 (9th Cir. 1980) (same), aff'd mem., 454 U.S. 1022 (1981); Sanders v. State, 231 Ga. 608, 613, 203 S.E.2d 153, 157 (1974) (invalidating padlock order as prior restraint).

The use of RICO-style laws to attack pornography must be subject to the same rigorous constitutional review. The fight against racketeering -- like land use regulation and the abatement of public nuisances -- is of course a legitimate sphere for the exercise of governmental power. But when the exercise of that power touches areas of arguably protected expression, the procedures employed must be suited to the delicate sphere of the First Amendment.

The recent decision in Arcara v. Cloud Books, Inc., 478 U.S. 697, 106 S. Ct.

3172 (1986), supports the application of First Amendment principles in the present case. In Arcara, this Court held that heightened First Amendment scrutiny was not required for a padlock sanction imposed upon a bookstore that had permitted prostitution and other illegal sexual activities on the premises. The Court expressly distinguished cases in which the offenses triggering governmental restrictions themselves involved speech-related activity, concluding that "the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books." 106 S. Ct. at 3178. In short, "[t]he legislation providing the closure sanction was directed at unlawful conduct having nothing to do with books or other expressive activity." Id.

Here, by contrast, Indiana seeks to apply the short-cut procedures and drastic remedies of its RICO law not to combat prostitution or other illegal sexual conduct, but to suppress allegedly obscene materials. Following the distinction drawn in Arcara, both the procedures and remedies of the Indiana RICO statute must be scrutinized under the First Amendment. As Justices O'Connor and Stevens stressed in a separate concurring opinion in Arcara:

> If . . . a city were to use a nuisance statute as a pretext for closing down a book store because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review.

Id. (O'Connor, J., concurring).

In the Fort Wayne case, the Indiana Supreme Court noted that obscene material is

not protected by the First Amendment, and held that the legislature could therefore include obscenity as a predicate offense under the RICO law without triggering any special scrutiny or heightened procedural requirements. See 4447 Corp. v. Goldsmith, 504 N.E.2d 559, 564-67 (Ind. 1987). But the court disregarded the crucial distinction between regulation of non-expressive conduct, like the prostitution in Arcara, and procedures used to regulate and punish speech. Where the target of state regulation is expression -- including what may be found after proper procedures to be unprotected expression -- First Amendment standards must be honored in fashioning the procedures. See Freedman v. Maryland, 380 U.S. 51, 57-59 (1965).

This Court has repeatedly stressed that "the line between speech unconditionally

guaranteed and speech which may legitimately be regulated, suppressed or punished, is finely drawn. The separation of legitimate from illegitimate speech calls for . . . sensitive tools." Speiser v. Randall, 357 U.S. 513, 525 (1958) (citations omitted). In the obscenity context, this concern operates with particular force. "[C]onstitutionally protected expression . . . is often separated from obscenity only by a dim and uncertain line." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963). "It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech." Marcus v. Search Warrant, 367 U.S. 717, 731 (1961).

In Marcus, the Court rejected an attempt to analogize the seizure of allegedly obscene books to the seizure of gambling equipment or other contraband. Because of the danger of suppressing protected speech, extra scrutiny and procedural safeguards were required. Id. at 730-31. This principle applies to the category of "racketeering" equally with that of "contraband."

Lower court decisions scrutinizing the application to obscenity of state RICO laws, while differing in their ultimate holdings, have consistently required that these statutes pass muster under the First Amendment. See, e.g., United States v. Pryba, 674 F. Supp. 1504, 1511-18 (E.D. Va. 1987); State v. Feld, 155 Ariz. 88, 745 P.2d 146, 152-56 (Ct. App. 1987), cert. denied, 99 L. Ed. 2d 482 (1988). By contrast, in the Fort Wayne case, the Supreme Court of Indiana

failed even to recognize the First Amendment issues implicated by the RICO scheme and treated the Indiana statute purely as an exercise of the State's power to combat racketeering. This was obvious error. The Indiana statute must be scrutinized with reference to its actual operation and effect in regulating speech and speech-related activities.

II.

THE INDIANA RICO LAW FAILS TO EMBODY THE PROCEDURAL SAFEGUARDS MANDATED BY THIS COURT BEFORE SPEECH MAY BE SUPPRESSED ON THE GROUND THAT IT IS UNPROTECTED

We demonstrate below that the remedies provided by the Indiana RICO law operate as unconstitutional prior restraints of protected speech. See Point III infra. But even if they did not -- indeed, even if every single item suppressed under the statute turned out to be obscene, and therefore unprotected -- the statutory scheme would still have to provide the procedural safeguards mandated by this Court's First Amendment cases. The Indiana statute fails in several respects to satisfy these standards, and for this independent reason must be declared unconstitutional.

Ever since Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957), which upheld a narrowly-drawn injunction against specific books adjudicated obscene, this Court has required all injunctive schemes aimed at alleged obscenity to embody sufficient procedural safeguards against the suppression of protected speech. Ever mindful of the need for "sensitive tools" in separating obscene from non-obscene speech, Speiser v. Randall, 357 U.S. 513, 525 (1958), the Court has strictly limited circumstances allowing mass seizures, and has defined procedural requirements for actions seeking to enjoin the sale or exhibition of particular named or unnamed items.

The Indiana RICO statute authorizes ex parte seizure and padlocking upon a showing of probable cause to believe that violations of the statute have been

committed; shifts the burden of obtaining judicial review to the defendant; fails to provide a prompt adversarial hearing on the question of obscenity; and provides no safeguard against restraints of indefinite duration pending appellate review. Each of these aspects violates the clearly articulated standards of this Court. Therefore, regardless of the merits of the particular post-trial remedies provided by the Indiana statute, the law is facially unconstitutional on procedural grounds alone.

A. The Indiana Law's Seizure Provision Violates this Court's Long-Standing, Unequivocal Rule Against Mass Seizures Prior to an Adjudication of Obscenity

In Kingsley Books, this Court approved an ex parte injunction against a particular book, followed by a trial on the merits within one day, and a decision within

two days of the close of trial. 354 U.S. at 437 n.1. The Court stressed that the New York provision "studiously withh[eld] restraint upon matters not already published and not yet found to be offensive." Id. at 445. Consistent with Kingsley Books, the Court has, over the last three decades, consistently disapproved procedures permitting the mass seizure of presumptively protected material prior to an adversary judicial determination of the obscenity of the items seized.

In Marcus v. Search Warrant, 367 U.S. 717 (1961), the Court struck down a scheme, remarkably similar to the one at issue here, permitting a judge to issue an ex parte warrant commanding seizure of all allegedly obscene material upon a finding of probable cause to believe that an obscenity violation had been committed. A hearing to

determine the obscenity of the seized material had to be set between five and twenty days after the seizure, but no time limit was provided for a decision. See id. at 718-21.

The Court invalidated these procedures on grounds directly applicable to the present case. Chief among the statute's infirmities was that "the warrants issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene." Id. at 731-32. The Court pointedly distinguished between the carefully limited injunction approved in Kingsley Books and "a scheme which in operation inhibited the circulation of publications indiscriminately because of the absence of any such safeguards." Id. at 734-35.

The Court further held that the provision for an accelerated obscenity hearing was inadequate because the statute did not guarantee a speedy decision. The Court noted with disapproval that two months had elapsed between seizure and decision -- unacceptable for a mass seizure. Id. at 737-38. "Kingsley Books does not support the proposition that the State may impose the extensive restraints imposed here on the distribution of these publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material is legally obscene." Id. at 735-36.

The Court has reaffirmed and expanded this holding in subsequent cases. In A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964), a plurality of the Court invalidated a seizure "strikingly similar" to the one in Marcus. Id. at 209. Justice

Brennan's opinion held that the seizure order was not saved by provision of a full post-seizure adversary hearing on the question of obscenity. "For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgement of the right of the public in a free society to unobstructed circulation of non-obscene books." Id. at 213. In Carroll v. President & Commissioners of Princess Anne, 393 U.S. 175 (1968), the Court indicated that Marcus and Quantity of Books stand for a general presumption, applicable beyond the obscenity setting, against prior restraints issued without notice and an opportunity to be heard in an adversary proceeding. Id. at 181-82.

Heller v. New York, 413 U.S. 483 (1973), underscored the distinction between the Marcus line of cases and the specific, narrowly drawn injunctive relief approved in

Kingsley Books. In Heller, the Court upheld the seizure of one copy of a single film for the limited purpose of preserving it as evidence. The Court noted that no restraint of any kind had been placed upon continued exhibition of the film or any other materials, and that the defendant had never sought expedited judicial consideration of either obscenity or the validity of the seizure. Id. at 490. The Court expressly distinguished cases concerning "the seizure of large quantities of books for the sole purpose of their destruction," and assured that "[c]ourts will scrutinize any large-scale seizure of books, films, or other materials presumptively protected under the First Amendment to be certain that the requirements of A Quantity of Books and Marcus are fully met." Id. at 491 (emphasis added).

The vitality of the Marcus-Quantity of Books rule was recently reaffirmed in New York v. P.J. Video, Inc., 475 U.S. 868 (1986), in which the Court recognized again the requirement that "the large-scale seizure of books or films constituting a 'prior restraint' must be preceded by an adversary hearing on the question of obscenity." Id. at 873.

The Indiana RICO statute, by authorizing mass, ex parte seizures and padlocking of the premises prior to any judicial determination of obscenity, violates this Court's long-settled rule. The Indiana Court of Appeals examined this point at length, concluding that a procedure permitting "en masse seizure" of inventory based upon "ex parte determinations only as to the probability of obscenity violations, with no regard to the obscenity of all seized

materials," and based "exclusively upon conclusory assertions and descriptions by police of alleged obscenity," was unconstitutional under Marcus and Quantity of Books. 4447 Corp. v. Goldsmith, 479 N.E.2d 578, 595-96 (Ind. Ct. App. 1985). The Indiana Supreme Court failed even to mention Marcus or the question of mass, ex parte seizures, discussing only the post-seizure procedural requirements addressed below in Point II(B). The constitutional violation recognized by the Court of Appeals remains obvious and irrefutable.[1/]

The unspoken rationale for the Indiana court's disregard of Marcus and its progeny may be its view of the Indiana RICO

1/ Before authorizing mass seizure of printed materials, the trial court should also have required obscenity to be demonstrated by clear and convincing evidence. See California ex rel. Cooper v. Mitchell Bros.' Santa Ana Theater, 454 U.S. 90, 92-94 (1981).

statute as a speech-neutral anti-racketeering weapon. If purveying obscene materials is seen merely as a variety of "racketeering activity," then the issuance of a warrant permitting mass seizures of property need only be justified by minimal due process standards. But as noted above in Point I, merely re-labeling an obscenity regulation as an anti-racketering measure does not obviate First Amendment requirements. The need for "sensitive tools" to separate protected from unprotected speech bars Indiana from treating presumptively protected printed materials as it treats narcotics, gambling paraphernalia, or other contraband. See Quantity of Books, 378 U.S. at 211-12; Marcus, 367 U.S. at 730-31.[2/]

2/ Cf. Smith v. California, 361 U.S. 147, 152-53 (1959) (requiring scienter for obscenity prosecution): "There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but
(footnote continued)

B. The Indiana RICO Statute Fails to Provide Constitutionally Required Post-Seizure Safeguards, Including a Prompt Judicial Resolution of Prior Restraint Issues

In addition to the absolute ban on ex parte mass seizures, this Court has established minimum procedural requirements governing injunctions against specific, allegedly obscene items. Both the interim injunctions and the permanent remedies provided by the Indiana RICO statute violate these standards.

In Freedman v. Maryland, 380 U.S. 51 (1965), the Court invalidated a Maryland prior review system allowing largely unfettered administrative discretion to ban films, setting no time limits for the review

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the constitutional guaranties of freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller."

procedure, and prohibiting the showing of banned films unless the exhibitor undertook an appeal to the Maryland courts. Id. at 54-55. In striking down this scheme as a prior restraint, the Court established three procedural requirements, further refined and amplified by subsequent cases, that must be met by any state seeking to enjoin the display or dissemination of allegedly obscene material.3/

First, Freedman held that "the burden of proving that the film is unprotected expression must rest on the censor." 380 U.S. at 58. Subsequent cases

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3/ Although Freedman addressed only film censorship, subsequent cases dealing with printed materials have given its rules more general application. See, e.g., McKinney v. Alabama, 424 U.S. 669 (1976); Spokane Arcades, Inc. v. Brockett, 631 F.2d 135, 138 (9th Cir. 1980), aff'd mem., 454 U.S. 1022 (1981).

have made clear that the state also has the burden of instituting prompt judicial review. See Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 562 (1975); Spokane Arcades, Inc. v. Brockett, 631 F.2d 135, 138 (9th Cir. 1980), aff'd mem., 454 U.S. 1022 (1981).

Second, Freedman required that a prompt, final, adversary adjudication on the issue of obscenity be assured "by statute or authoritative judicial construction." 380 U.S. at 58-59. In National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977) (per curiam) ("Skokie"), the Court extended the "strict procedural safeguards" of Freedman to the appellate process, holding that an injunction restraining First Amendment activity must be accorded "immediate appellate review" or stayed pending appeal. Id. at 44. See also M.I.C., Ltd. v. Bedford

Township, 463 U.S. 1341, 1343 (1983) (Brennan, Circuit Justice) (requirement of "'prompt final judicial decision,'" quoting Freedman, 380 U.S. at 59, required stay of preliminary obscenity injunction pending appeal where appellate review "will not be completed for several months").

Third, Freedman required that any restraint prior to judicial review must be "limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." 380 U.S. at 59. The Court elaborated on this requirement in Vance v. Universal Amusement Co., 445 U.S. 308 (1980) (per curiam), in which it struck down a nuisance abatement statute permitting "prior restraints of indefinite duration on the exhibition of motion pictures that have not been finally adjudicated to be obscene." Id. at 316. The Court held that "the absence

of any special safeguards governing the entry and review of orders restraining the exhibition of named or unnamed motion pictures" violated Freedman and rendered the statute unconstitutional. Id. at 317.

The Indiana RICO statute is constitutionally infirm under these cases for several reasons. The statute places no burden upon the state to bring about prompt judicial review of either the validity of the seizure or the obscenity of the seized materials. Having obtained, on an ex parte, probable cause showing, an order authorizing seizure of all inventory and padlocking of the premises, the prosecuting attorney has no further burden except to commence an action for permanent forfeiture within 180 days. See Ind. Code § 34-4-30.5-4(c) (1986). The burden is entirely upon the defendant to bring about judicial review of the initial

seizure and prompt judicial determination of obscenity.

The Indiana Supreme Court did not expressly address this issue, apparently assuming that it was acceptable to put the burden upon a defendant to "initiate such action by the filing of a motion to vacate the seizure order." 4447 Corp. v. Goldsmith, 504 N.E.2d 559, 567 (Ind. 1987). Since neither the statute nor Indiana's highest court have properly placed the burden upon the State, the statute is unconstitutional under Freedman and Southeastern Promotions.

Even where, as here, a defendant assumes the burden of initiating judicial proceedings to challenge a seizure, the Indiana RICO statute fails to provide "a prompt final judicial decision" or to limit the prior restraint pending that decision to

"the shortest fixed period compatible with sound judicial resolution." Freedman, 380 U.S. at 59. As demonstrated in Petitioner's Brief, although petitioner moved vigorously for reconsideration and review of the padlocking and mass seizure ordered by the trial court, all three of its bookstores remained sealed and padlocked for a full year, until the Indiana Court of Appeals finally granted a stay pending appeal. This Court disapproved far shorter delays in Southeastern Promotions, 420 U.S. at 562 (five months), and Freedman, 380 U.S. at 55 (six months).

The protracted process in this case was permitted by a statute that sets no time limits upon either the adjudication of obscenity or the appellate review of prior restraints. The Indiana Supreme Court upheld the statute because of its assumption that,

absent petitioner's interlocutory appeals, "a full adversarial hearing on the merits of the forfeiture action" would have been held "within a reasonable time." 504 N.E.2d at 567. The court gave no indication as to what it would consider to be "a reasonable time," but the statute itself requires only that a forfeiture action be commenced within 180 days of a seizure; it sets no time limit of any kind for a trial on the merits.

In any event, the padlocking of petitioner's bookstores for a full year pending judicial resolution of the validity of the ex parte seizure order itself violates Freedman, Vance, and Skokie by failing to place a strict limitation on temporary prior restraint of materials presumptively protected by the First Amendment. Petitioner's choice to pursue an interlocutory appeal rather than proceeding to trial on the merits

cannot vitiate the guaranties of Freedman and its progeny; what is guaranteed is not merely a trial on the merits on obscenity, but prompt resolution of the broader question of whether the State has imposed an unconstitutional prior restraint. See Skokie, 432 U.S. at 44.

Finally, even if the procedures governing pretrial seizure and padlocking complied with the mandates of Freedman, the ultimate remedies permitted under the Indiana law would not. Having proven only that two pieces of obscene material were sold or exhibited -- sufficient predicate "racketeering activity" to trigger the statute's remedies -- the State may obtain forfeiture of all material and bar future dissemination of material not yet even in defendant's possession.

These remedies attempt an end-run around Freedman and Vance. No burden is placed upon the State to justify the suppression of future materials, because no showing of any kind is required; upon proof of two violations, all subsequent speech may be barred and all materials forfeited. No adversary judicial determination of the obscenity of these items -- prompt or otherwise -- is ever required. And the prior restraint on future speech, far from being for a minimal "fixed period," is indefinite, indeed possibly permanent. For this additional reason, the Court of Appeals correctly held that the statute was unconstitutional as applied to obscenity. 479 N.E.2d at 596-97.

In short, Indiana's RICO law embodies none of the special procedural safeguards required for the delicate task of

separating protected from unprotected speech. Applying RICO to alleged obscenity unleashes a howitzer where the precision of a scalpel is needed. The blunderbuss procedures of the Indiana law pose a threat to protected speech and should therefore be declared unconstitutional.

III.

THE REMEDIES PROVIDED BY THE INDIANA RICO STATUTE OPERATE AS UNCONSTITUTIONAL PRIOR RESTRAINTS ON PROTECTED SPEECH

The Indiana RICO statute permits the suppression of vast quantities of materials never adjudicated obscene, and therefore amounts to a prior restraint of protected speech. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

Under the Indiana RICO statute, upon finding by a preponderance of the evidence that a defendant has engaged in a "pattern of racketeering activity" -- i.e., selling or exhibiting two obscene items within five years -- a court may order, inter alia, dissolution of the enterprise, suspension or revocation of any licenses or permits, and forfeiture of the corporate charter, and may prohibit defendant from engaging in similar activity in the future. See Ind. Code § 34-4-30.5-2 (1986). Additionally, the county prosecuting attorney "may bring an action for the forfeiture of any property used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2." Ind. Code § 34-4-30.5-3(a) (1986). See 4447 Corp. v. Goldsmith, 504 N.E.2d 559, 561 (Ind. 1987).

The operation and effect of these provisions is to permit state officials -- upon demonstrating that two or more books, video tapes, or other items ultimately found to be obscene have at any time within a five year period been sold or exhibited by a bookstore, video outlet, drug store, or other establishment -- to run the defendant and all other entities constituting the "enterprise" permanently out of business. The impact of these remedies goes far beyond the one-year padlocking provided by most nuisance abatement laws. On the face of the statute, a finding that a bookstore sold two copies of a single book or magazine ultimately found to be obscene would apparently justify an order forfeiting all property used in conducting the "enterprise" and barring the store's owner not only from continuing operation at the present site, but from operating a bookstore anywhere in the jurisdiction.

Whatever the validity of these extraordinary penalties when used to attack drug dealing, illegal gambling, or extortion, they are plainly inappropriate in a First Amendment context, and cannot be used to close an entire bookstore based on a mere finding that two books are obscene. Any such remedy violates the presumption against prior restraints, regardless of what procedural safeguards are employed in adjudicating the predicate offenses.

As this Court observed in Vance v. Universal Amusement Co., 445 U.S. 308 (1980) (per curiam), "the burden of supporting an injunction against a future exhibition is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication" because "'a free society prefers to punish the few who abuse rights of speech after they break the law than to

throttle them and all others beforehand.'" Id. at 315-16 & n.13 (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975) (emphasis in original)).

Applying this well-settled principle, the overwhelming majority of lower court decisions addressing padlocking, license revocation, or forfeiture as a sanction for obscenity have found these remedies to be unconstitutional prior restraints.[4/] As the Eleventh Circuit

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4/ See, e.g., City of Paducah v. Investment Entertainment, Inc., 791 F.2d 463, 469-70 (6th Cir.) (license revocation), cert. denied, 107 S. Ct. 316 (1986); Gayety Theatres, Inc. v. City of Miami, 719 F.2d 1550, 1550 (11th Cir. 1983) (per curiam) (license revocation); Universal Amusement Co. v. Vance, 587 F.2d 159, 164-66 (5th Cir. 1978) (en banc) (padlocking), aff'd on other grounds, 445 U.S. 308 (1980); General Corp. v. State ex rel. Sweeton, 294 Ala. 657, 666, 320 So. 2d 668, 676 (1975) (padlocking), cert. denied, 425 U.S. 904 (1976); State v. Feld, 155 Ariz. 88, 745 P.2d 146, 154 (Ct. App. 1987) (RICO

(footnote continued)

concluded in holding unconstitutional a one-year license revocation based on a single obscenity finding, "'[T]he City can no more impose such a prior restraint on the plaintiff than could it by ordinance restrain a citizen from speaking in public for one year because the citizen once uttered an obscenity in a public place.'" Gayety Theatres, Inc. v. City of Miami, 719 F.2d 1550, 1552 (11th Cir. 1983) (per curiam) (quoting District Court opinion No. 82-1971-Civ-JE, slip op. at 2-3 (S.D. Fla. Oct. 1, 1982)). The open-ended remedies authorized by the Indiana RICO statute go even further in restraining future, presumptively protected speech.

The Indiana Supreme Court nevertheless upheld the application of this statutory

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forfeiture provisions), cert. denied, 99 L. Ed. 2d 482 (1988).

scheme to obscenity, holding that the state's anti-racketeering purpose rendered irrelevant the statute's impact in a particular case. "The remedy of forfeiture is intended not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity." 504 N.E.2d at 565.

But as demonstrated above in Point I, whatever the purpose of the RICO statute, its harsh remedies must be measured for their effect upon protected speech. The remedies provided in the Indiana statute sweep too broadly, and have too drastic and immediate an effect upon presumptively protected speech, to be regarded simply as content-neutral punishments for racketeering activity -- particularly in light of the dim and uncertain line between the prohibited predicate conduct and the far wider range of

protected materials inevitably restrained under the statutory scheme.

The Indiana RICO law goes considerably beyond the padlock sanction upheld in Arcara v. Cloud Books, Inc., 478 U.S. 697, 106 S. Ct. 3172 (1986). There, the one-year closure of a bookstore as punishment for permitting prostitution and other sexual misconduct on the premises was held not to be a prior restraint for two reasons:

> First, the order would impose no restraint at all on the dissemination of particular materials, since respondent is free to carry on his bookselling business at another location, even if such locations are difficult to find. Second, the closure order sought would not be imposed on the basis of advance determination that the distribution of particular materials is prohibited -- indeed, the imposition of the closure order has nothing to do with any expressive conduct at all.

106 S. Ct. at 3177 n.2.

Here, by contrast, the bookseller does not suffer a finite punishment that permits him to carry on his activities elsewhere; instead, he may have his entire inventory seized and forfeited, his license revoked, and his ability to engage in similar activity curtailed or barred by court order. The sanctions relate precisely to "expressive conduct" -- sweeping large quantities of protected expression into a wholesale ban triggered by a couple of properly suppressible items. Moreover, the offense that may bring about the destruction of the bookseller's business is not clearly defined illegal conduct like prostitution or public sexual activity, but the amorphous possibility that a jury may ultimately find two books, magazines, or movies to be obscene. The chilling effect in these circumstances is exponentially greater than in Arcara.

The harsh remedies of the Indiana RICO law more closely resemble the restraint authorized by the nuisance statute struck down in Near v. Minnesota, 283 U.S. 697 (1931). The state in Near sought to justify an injunction against future publication of a scandalous newspaper as a simple punishment for past, unprotected speech. This Court, in an opinion by Chief Justice Hughes, rejected that construction:

> The object of the statute is not punishment in the ordinary sense, but suppression of the offending newspaper or periodical. The reason for the enactment, as the state court has said, is that prosecutions to enforce penal statutes for libel do not result in "efficient repression or suppression of the evils of scandal." Describing the business of publication as a public nuisance, does not obscure the substance of the proceeding which the statute authorizes.

Id. at 711 (quoting State ex rel. Olson v. Guilford, 174 Minn. 457, 462, 219 N.W. 770, 772 (1928)).

The Supreme Court of Indiana similarly sought to justify the restraints imposed by Indiana's RICO law as a necessary new weapon to root out organized crime. 504 N.E.2d at 565. As it did in Near, the Court should look beyond the State's characterization and strike down the Indiana law as an unconstitutional prior restraint.

CONCLUSION

The judgment of the Supreme Court of Indiana should be reversed.

Respectfully submitted,

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